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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 592

ROBERT E. KLEINSCHMIDT,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

ARTHUR E. SIMPSON,
ROBERT E. KLEINSCHMIDT,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 592

ROBERT E. KLEINSCHMIDT,

Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,

A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

I.

Your petitioner, Robert E. Kleinschmidt, presents this petition for a writ of certiorari directed to the Supreme Court of the State of Missouri to review the judgment of said Court whereby Division No. 2 thereof on May 5, 1942 dismissed petitioner's appeal. In said appeal said Division No. 2 of said Court on June 17, 1942 overruled petitioner's motion for rehearing, and on July 28, 1942 overruled petitioner's motion to transfer said appeal to the Supreme

Court of Missouri in banc. Said Supreme Court of Missouri in banc on November 12, 1942 overruled petitioner's motion for leave to file in banc his motion to transfer said appeal to banc.

II.

Statement of the Matter Involved.

Petitioner brought suit at law in the Circuit Court of Jefferson County, Missouri, for $75,000 actual damages and $150,000 punitive damages for libel. The petitioner is a lawyer and was a candidate for circuit judge and the defendant is and was the publisher of the St. Louis Globe-Democrat, a newspaper, which on November 7, 1938, the day before election, published an article headed "Admits Letting Gamblers Operate", in which it was stated that, after petitioner had raised the gambling issue in the campaign against his opponent, he had admitted that he had permitted certain notorious "gambling casinos" to operate while he had been prosecuting attorney. The case was tried before a jury and resulted in a judgment in favor of the defendant. Petitioner appealed to the Supreme Court of Missouri and his appeal was assigned to Division No. 2 of said Court. In due time petitioner filed in said Division No. 2 his printed "Abstract of the Record" and his "Statement, Brief and Argument" as required by the statutes and rules of said Court. The respondent filed its brief, and the appeal was orally argued before said Division No. 2, which, without reviewing the cause on its merits, dismissed said appeal, stating as grounds that the petitioner had failed to comply with Rule 15 of said Court.

In dismissing petitioner's appeal Division No. 2 held that the assignments of error in petitioner's Statement, Brief and Argument were "very general" and did not comply with Rule 15 of said Court and that the "Points and

Authorities" in petitioner's Statement, Brief and Argument were insufficient and constituted merely "a numerical list of abstract statements of law or facts" without showing "any connection with errors alleged to have been committed by the trial court".

Petitioner contends that his assignment of errors as set forth on pages 14 to 19, inclusive (Record p. 276), of petitioner's Statement, Brief and Argument, are definite and specific and that such assignments of error are supplemented by his "Points and Authorities" contained in the same Statement, Brief and Argument at pages 21 to 26, inclusive, thereof (Record p. 283). Explicit references, showing the pages of the printed abstract where the rulings of the trial court complained of are expressly set forth in petitioner's said printed brief as follows:

Assignment of Errors	Page of Brief Referring to Abstract	Page of Abstract Referred to
I	27 (Record p. 289)	50
II	11, 28 & 29 (Record pp. 273, 290, 291)	63, 64 & 103
IV	9 (Record p. 271)	137 — 232
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Petitioner further contends that under the same conditions as those existing in petitioner's appeal said Supreme Court of Missouri has granted to all other appellants a review on the merits of their respective cases on appeal where the specifications of error and the points and authorities

contained in the statements, briefs and arguments filed are like and similar to those contained in the statement, brief and argument of the petitioner in his appeal, as evidenced by the decisions of said Division No. 2 in *Smith* v. *Thompson et al.*, 161 S. W. (2d) 232 (in which a rehearing was denied on May 5, 1942, the date on which petitioner's appeal was dismissed); *Laughlin, Administratrix,* v. *Boatmen's National Bank of St. Louis,* 163 S. W. (2d) 761, which was decided on the same day on which petitioner's appeal was dismissed; *Polk* v. *M. K. & T. R. Co.,* 341 Mo. 1213, l. c. 1225, 111 S. W. (2d) 138, l. c. 144; and the decisions of Division No. 1 of said Court in *Wallace* v. *Libby,* 231 Mo. 341, 132 S. W. 665, l. c. 666; *Noell* v. *Mo. Pac. R. Co.,* 335 Mo. 687, l. c. 695, 74 S. W. (2d) 7, l. c. 10; *Collier et al.* v. *Catherine Lead Co.,* 208 Mo. 246, 106 S. W. 971, l. c. 973, and *Magers* v. *Northwestern Mutual Life Ins. Co.,* 152 S. W. (2d) 148; and by the decision of said Court, in banc, in *Farmers' Elevator & Grain Co.* v. *Davis,* 267 S. W. 393, l. c. 398. In petitioner's appeal no motion to dismiss said appeal had been filed by respondent by reason of any alleged violation of Rule 15 of said Court, whereas in the cases of *Smith* v. *Thompson et al.* and *Laughlin, Administratrix* v. *Boatmen's National Bank,* decided contemporaneously with the decision of Division No. 2 with petitioner's appeal, there had been filed formal motions to dismiss alleging precisely violations of said Rule 15.

III.

Basis Upon Which This Court Has Jurisdiction to Review the Judgment in Question.

The grounds upon which petitioner claims the questions involved are substantial are that the final judgment of the Supreme Court of Missouri in banc, being the highest court of the State of Missouri in which a decision of petitioner's appeal could be had, denied petitioner's motion for leave

to file in banc his motion to transfer the appeal to the court in banc and thereby denied to the petitioner his rights, privileges and immunities as a citizen guaranteed under the Fourteenth Amendment to the Constitution of the United States. The provisions of this amendment are not satisfied unless a litigant be granted a reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. The deprivation of such constitutional rights is equally banned whether such deprivation be by legislative or by judicial action. All persons within the territorial limits of Missouri have equal rights to judicial remedies in like cases under like circumstances. The federal question did not arise until Division No. 2 of the Missouri Supreme Court dismissed petitioner's appeal.

The stage of the proceedings at which the federal question arose and the method by which it was raised was that after the appeal had reached the Supreme Court of Missouri and Division No. 2 rendered its opinion dismissing the appeal, the petitioner raised said federal question in his motion for rehearing (Record p. 327) and continued to reiterate it in his motion filed in Division No. 2 to transfer the cause to banc by virtue of the Amendment of 1890 to Article VI of the Constitution of Missouri, Section 4, providing that when a federal question is involved the cause, on the application of the losing party, should be transferred to the court in banc for its decision (Record p. 348); and in petitioner's application to the court in banc for leave to file in banc his motion to transfer the cause to the court in banc the federal question was again urged (Record pp. 351 & 359).

The rights claimed by petitioner under said federal question were denied to the petitioner by Division No. 2 of said Court in overruling his motion for rehearing (Record p.

347) and in overruling his motion to transfer the appeal to the court in banc (Record p. 350), and by the court in banc in overruling petitioner's motion for leave to file in banc his motion to transfer the appeal to banc (Record p. 387).

IV.

The Question Presented.

Can the Supreme Court of Missouri refuse to this petitioner a review of his appeal on the merits by construing its Rule 15 in an arbitrary manner contrary to the construction placed thereon in all other cases both before and since the decision in petitioner's case, and so deny to petitioner equal rights with other litigants in Missouri courts in like cases under like circumstances?

V.

The Reasons Relied on for the Allowance of the Writ.

The decision of the Supreme Court of Missouri that petitioner's appeal be dismissed without granting petitioner a review on the merits, although petitioner had complied with the statutes and rules of said Court entitling him to such review, as theretofore and since construed by said Court in all other cases, constitutes a decision by a state court of a federal question of substance, that is, of the protection afforded by the Fourteenth Amendment to the Constitution of the United States, in a way probably not in accord with the applicable decisions of the Supreme Court of the United States, including the decisions in *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, l. c. 42 & 43; *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, l. c. 681; *Dohany* v. *Rogers,* 281 U. S. 362, l. c. 369, and *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74, l. c. 81. These decisions require equality of treatment of all litigants

within the respective territorial limits of state courts in like cases under like circumstances.

VI.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of Missouri, to the end that the errors aforesaid may be corrected by this Court.

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ROBERT E. KELINSCHMIDT (pro se)
Hillsboro, Missouri,
Attorneys for Petitioner.

PETITIONER'S BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 592

ROBERT E. KLEINSCHMIDT,
Petitioner (Appellant Below),

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
A CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Judgment Below.

The opinion of the Missouri Supreme Court in the matter sought to be reviewed has not yet been officially reported. The opinion will be found in the printed transcript of the record in this case at page 315.

II.

Jurisdiction.

1. The date on which the judgment was rendered and the filing of the motion for rehearing and of the several motions

to transfer to the court in banc have heretofore been set forth in the petition for the writ at page 1.

2. The statutory provision which is believed to sustain jurisdiction is the Act of Congress of February 13, 1925, C. 229, (Section 237 (b)), 43 Stat. 937.

3. The facts which are believed to bring the judgment of the Supreme Court of Missouri within said statute authorizing a review by certiorari are those heretofore set forth under heading III in the petition for the writ at page 4.

4. The cases believed to sustain the jurisdiction are those set forth in the petition for the writ of certiorari under heading V at page 6.

III

Statement of the Case.

In the petition for the writ under heading II, page 2, appears a statement of the case.

IV.

Specifications of Error.

1. The Supreme Court of Missouri, in banc, erred in overruling petitioner's motion for leave to file in banc his motion to transfer said appeal to banc (Record p. 387).

2. The Supreme Court of Missouri erred in overruling petitioner's motion filed in Division No. 2 thereof to transfer said cause to banc (Record p. 350).

3. The Supreme Court of Missouri, Division No. 2, erred in overruling petitioner's motion for rehearing (Record p. 347).

4. The Supreme Court of Missouri, Division No. 2, erred in dismissing petitioner's appeal without a review on the merits upon the alleged ground that petitioner had failed

to comply with Rule Number 15 of said court, requiring that appellants in said court in their printed briefs should distinctly allege the errors committed by the trial court and should state in numerical order the points relied on, with citation of authorities thereunder (Record p. 315).

5. The Supreme Court of Missouri erred in dismissing petitioner's appeal without a review on the merits for alleged non-complaince with Rule 15 of said court, although granting to all other appellants a review on the merits of their respective cases on appeal, where the specifications of error and the points and authorities contained in the statements, briefs and arguments filed were like and similar to those contained in the statement, brief and argument of the petitioner filed in his appeal (Record p. 315).

V.

ARGUMENT.

A.

Timely Filing of Petition for Writ of Certiorari.

The federal question here presented did not arise until the case had reached the Supreme Court of Missouri and Division No. 2 thereof rendered its decision dismissing petitioner's appeal, thereby denying him the rights which it had consistently granted to other litigants.

In *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, l. c. 677, this Court said:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the Fourteenth Amendment.

> The additional federal claim thus made was timely, since it was raised at the first opportunity. Missouri ex rel. Missouri Ins. Co. *v.* Gehner, 281 U. S. 313, ante, 870, 50 Sup. Ct. Rep. 326."

To the same effect is *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358.

The petitioner's application filed in the Supreme Court of Missouri in banc for leave to file in banc his motion to transfer his appeal to the court in banc was overruled on November 12, 1942, and this petition for writ of certiorari was filed within ninety days thereafter.

The amendment of 1890 to Article VI of the Constitution of Missouri, Section 4, provides:

> "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

In *Gorman* v. *Washington University*, 316 U. S. 98, 86 L. Ed. 895, the Court said with reference to this provision of the Missouri Constitution (l. c. 895):

> "Under the provisions Division One of the Supreme Court of Missouri, sitting in the present cause, in which 'a federal question is involved,' was not the last state court in which a decision of that question could be had. Such a case is one which 'after final disposition of the cause by the division' could on petitioners' application be transferred to the full court for review, and the decision and judgment rendered by Division One could be set aside by the court sitting en banc."

The petitioner exhausted his remedies in said Missouri Supreme Court before filing this petition here.

B.

The Fourteenth Amendment Guarantees Petitioner A Hearing on Errors Properly Raised in His Appeal.

The Fourteenth Amendment to the Federal Constitution is not satisfied unless a litigent be granted a reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it. *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, l. c. 42; *Dohany* v. *Rogers,* 281 U. S. 362, l. c. 369.

The deprivation of the constitutional rights of a citizen is equally banned whether such deprivation be by legislative or by judicial action. In *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, l. c. 681, the Court says:

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

All persons within the territorial limits of the respective jurisdictions of state courts must have equal rights in like cases under like circumstances. The Court in *Ohio ex rel. Bryant* v. *Akron Metrop. Park District,* 281 U. S. 74, l. c. 81, said:

> "It has been held by this Court that the equal protection clause of the Fourteenth Amendment is not violated by diversity in the jurisdiction of the several courts of a state as to subject matter or finality of decision if all persons within the territorial limits of the

respective jurisdiction of the state courts have an equal right in like cases under like circumstances to resort to them for redress."

C.

Petitioner Complied With Rule 15 of the Missouri Supreme Court.

In the opinion of Division No. 2 of the Supreme Court of Missouri it was held that petitioner's appeal should be dismissed because of failure to comply with said Court's Rule No. 15. Said Rule is as follows:

"RULE 15. BRIEFS: What to Contain and When Served. The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed. The brief for appellant shall distinctly allege the errors committed by the trial court, and shall contain in addition thereto: (1) A concise statement of the grounds on which the jurisdiction of this court is invoked; (2) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument; (3) a statement, in numerical order, of the points relied on, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not specified; and (4) a printed argument, if desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

> In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth."

This rule of court supplements Sec. 1226, R. S. Missouri, 1939, which reads as follows:

> "Sec. 1226. Statement and brief to be filed, when.—On appeals and writs of error each party shall, on or before the day next preceding the day on which the cause is docketed for hearing, make out and furnish the court with a clear and concise statement of the case, and the points intended to be insisted on in argument."

Petitioner contends that he fully complied with said Rule 15, as will appear from his petition for certiorari under heading II, page 2.

Respectfully submitted,

ARTHUR E. SIMPSON,
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Attorneys for Petitioner.